No. 3758

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB, a Corporation, and BJARNE ERIKSEN,

Appellants,

vs.

THE CALIFORNIA & ORIENTAL STEAMSHIP COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Plaintiff.

Messrs. McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE, Balfour Bldg., San Francisco, and Messrs. McCLANAHAN & DERBY, Merchants Exchange Bldg., San Francisco,

Attorneys for Defendants.

In the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAMSHIP CO., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELECTRISK KVALSTOF AKTIESELSKAB, a Corporation and BJARNE ERIKSEN, an Individual,

Defendants.

Order Appointing Receiver and Enjoining Interference With Him and Property in His Charge.

The above-entitled cause having come on for hearing before this Court on the 8th and 9th days of

August, 1921, upon the order of this Court under date of August 6th, 1921, directed to the above-named defendants, ordering them and each of them to show cause, if any there were, why a receiver should not be appointed by this Court to take charge of, manage and operate the steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment, pending the final determination of this cause, and why this Court should not issue an injunction restraining said defendants from in any way or manner interfering with the possession or use thereof by such receiver or his officers, agents or servants; and upon the petition for appointment of a receiver and for an injunction *pendente lite,* herein; and upon the bill of complaint for declaration and enforcement of constructive trust and injunction and surrender of instruments herein; and upon the answer of said defendants to said bill of complaint; and upon the affidavits of O. H. Root, Louis Ferrari and G. W. Bell in support of said petition for appointment of a receiver and injunction [1*] *pendente lite;* and upon the affidavits of C. Henry Smith, H. J. Hammer, Bjarne Eriksen and S. H. Derby, in resistance to said petition; and upon the testimony of said H. J. Hammer, given orally before said Court; and upon certain other documentary evidence, and oral admissions and stipulations by and between the attorneys for the respective parties made in open court; and upon all of the records and proceedings in the above-entitled matter.

*Page-number appearing at foot of page of original certified Transcript of Record.

And this Court having read the aforesaid documents and documentary evidence, and having heard said oral testimony and said oral admissions and stipplations by and between the attorneys for the respective parties hereto; and having heard G. W. Bell, Esq., of counsel for the above-named plaintiff and petitioner, and Warren Olney, Jr., Esq., of counsel for the above-named defendants; and it appearing that said order to show cause and said petition were duly served upon the attorneys for said defendants on August 6th, 1921, and said defendants having appeared in response thereto; and it appearing that the steamship "Pacifico" is now in the bay of San Francisco, and within the Northern District of the State of California, and within the jurisdiction of this Court; and this Court having duly considered said documents and evidence, and the arguments of counsel for the respective parties, and having given the matter due deliberation.

And this Court having in open court suggested to the defendants herein the alternative that if the defendants would prefer to furnish a bond conditional that defendants would abide by and perform all orders and decrees which might be rendered in said cause, and would return said ship and property to this jurisdiction to abide by and perform the final decree in said cause in the event it should be in favor of plaintiff, instead of having a receiver appointed, said Court would, in [2] lieu of appointing a receiver, order such a bond to be furnished by defendants and would fix the amount

thereof, and the defendants having declined to accept such alternative course:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Captain John Leale, of San Francisco, California, be, and he hereby is appointed receiver, pending the final determination of this cause, or until the further order of this Court, of the steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment, and the whole thereof, including all books of account, log-books and other books, papers, records, documents and accounts, and all stores, supplies, fuel and movables and fixtures of every kind and nature whatsoever, upon said steamship, excepting only the personal effects of the master and crew of said steamship.

AND IT IS FURTHER ORDERED that said receiver be and he is hereby authorized immediately to take exclusive possession and charge of said steamship and described property, and to manage, operate and run the same in such manner as will in his judgment produce the most satisfactory results possible, and produce the greatest net profit, and to keep, preserve and protect said property in proper condition and repair; and in his discretion to employ and discharge and fix the compensation of the officers, and crew, and employees necessary to the operation of said steamship, and the business thereof, and to make such payments as may be needful and proper in so doing; and, in his discretion, to make and enter into contracts of affreightment and charter-party for said steamship; and to collect

the freights, charter hire and profits earned by said steamship; and to make appropriate payments therefrom on account of accruing charges incurred in the operation of said steamship, and the execution of this trust, and to keep said property in a proper state of repair for efficient use, and properly insured; and said receiver is [3] authorized and directed to keep said property adequately insured at all times against the perils of the sea, fire, and all other risks and contingencies against which it is usual and customary to carry insurance for vessels of the type and character of the steamship "Pacifico," and also to procure and carry insurance against such risks and contingencies in the operation of said steamship as it is usual and customary to carry insurance against in the operation of vessels of her type and character; and said receiver is authorized, in his discretion, to procure repairs to be made upon said vessel which are in the judgment of said receiver necessary or advisable to place or keep her in proper seaworthy condition and to procure supplies, materials, labor and other necessaries required for the proper operation of said vessel; and said receiver may upon application to this Court and notice thereof to the parties to this cause, and the order of this Court hypothecate or pledge said steamship for the purpose of raising money for the purposes aforesaid and or the purpose of discharging any lien that may now exist or may hereafter arise on said steamship; and said receiver is authorized and empowered to institute and prosecute all such suits as may be necessary in his judg-

ment for the proper protection of said property and the operation thereof and the trust imposed in him, and likewise to defend all suits instituted against him as such receiver, or against said steamship; and said receiver is empowered to employ an attorney to aid him in the performance of his trust, said attorney to be paid out of the assets coming into the hands of the receiver.

And said receiver is authorized and directed to open proper books of account wherein shall be stated the earning, expenses, receipts and disbursements of said trust, and to preserve proper vouchers for all payments made by him on account thereof.

AND IT IS FURTHER ORDERED that the bond of said receiver [4] in the sum of $50,000 conditioned that he will well and truly perform the duties of his office and duly account for all moneys or property which may come into his hands, and abide by and perform all things which he shall be directed to do, with sufficient sureties to be approved by a Judge of this court be filed in the office of the clerk of this court as a condition to the taking of possession of said property by said receiver, and that if this Court shall deem necessary it may hereafter require the amount of said bond to be increased or diminished.

AND IT IS FURTHER ORDERED that the master and officers and crew of said steamship "Pacifico" and all other persons whomsoever, be and they are hereby required and commanded forthwith, upon demand of said receiver or his duly authorized agents to turn over and deliver to said

receiver said steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment and the whole thereof, and all books of account log-books and other books, papers, records, documents and accounts and all stores, supplies, fuel and movables and fixtures and every kind and nature whatsoever, upon the said steamship, excepting only the personal effects of the master and crew on said steamship, and the master and crew and employees of said steamship are and each of them is hereby commanded and required to obey and perform such orders as may be given to them from time to time by said receiver or his authorized agents in operating said steamship and performing this trust.

And the defendant Nosrk Hydro Electrisk Kvalstof Aktieseslkab and its officers, directors, agents, attorneys and employees, and the defendant Bjarne Eriksen, and all other persons claiming to act by, through, or under said defendants or either of them, and all other persons whomsoever, are hereby enjoined from interfering in any way whatsoever with the possession or management of said [5] property over which said receiver is hereby appointed, or any part thereof, and from interfering in any way to prevent the discharge of his duties or the operating of said property, and from in any way encumbering said property or attempting to so do, and from in any way transferring or attempting to transfer said property or any part thereof.

IT IS FURTHER ORDERED, as a condition to the taking of possession of said property by said receiver that the plaintiff California & Oriental

Steamship Company immediately file with the clerk of this court a bond in the sum of $10,000.00, with sufficient sureties, to be approved by a Judge of this court, conditioned that said plaintiff will abide by and perform all orders and decrees of this Court rendered against or directed to said plaintiff, and will pay all damage suffered by the defendants through the appointment of said receiver in case said appointment is hereafter vacated or final judgment goes against the plaintiff and it be finally decided in said cause that plaintiff was not entitled to said receiver, and that if this Court shall deem necessary, it may hereafter require the amount of said bond to be increased or diminished.

Dated San Francisco, California, August 15th, 1921.

WM. C. VAN FLEET,
Judge of United States District Court.

[Endorsed]: Filed Aug. 15, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [6]

In the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAMSHIP Co., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB, a Corporation, and BJARNE ERIKSEN, an Individual,

Defendants.

Agreed Statement of Case for Use on Appeal from Order Appointing Receiver Pendente Lite.

IT IS HEREBY STIPULATED: That on the 16th day of July, 1921, the plaintiff in the above-entitled cause filed its bill of complaint herein, and service of summons was made upon the defendants on the 18th day of July, 1921. That the body of said complaint and its verification read:

BILL OF COMPLAINT FOR DECLARATION AND ENFORCEMENT OF CONSTRUCTIVE TRUST AND INJUNCTION AND SURRENDER OF INSTRUMENTS.

The California & Oriental Steamship Co., a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, said state, brings

this [7] bill of complaint against Norsk Hydro Electris Kvalstof, a corporation organized and existing under and by virtue of the laws of the Kingdom of Norway, and having its principal place of business in said kingdom, and against Bjarne Eriksen, an individual residing in the city of Kristiania, Norway, and being a citizen of the Kingdom of Norway, and respectfully alleges:

I.

The plaintiff, the California and Oriental Steamship Co., now is, and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California.

II.

That defendant Norsk Hydro Electris Kvalstof Aktieselskab, hereinafter for convenience called Norsk Hydro, now is and at all of the times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the Kingdom of Norway, and having its principal place of business in the city of Kristiania, Kingdom of Norway, and a citizen of said Kingdom of Norway.

III.

That defendant Bjarne Eriksen is an alien, and now is, and at all of the times herein mentioned has been, a resident of the city of Kristiania, Kingdom of Norway, and a citizen of the Kingdom of Norway.

That defendant Bjarne Eriksen now is, and at

all of the times herein mentioned has been an officer of said defendant, Norsk Hydro, and is now in the City and County of San Francisco, State of California and within the Northern District [8] of California and within the jurisdiction of the Southern Division of the United States District Court for said District.

IV.

That the steamship "Pacifico," hereinafter mentioned, is a vessel of Norwegian registry, of about 5453 tons dead weight, whereof one H. J. Hammer is, or lately was master. That said steamship is now in the bay of San Francisco, in the State of California, and within the Northern District of California, and within the jurisdiction of the Southern Division of the United States District Court for said District.

V.

That in the month of October, 1920, and for some time theretofore, said steamship "Pacifico" was a vessel of Japanese registry, then called the "Taigai Maru" and owned by Japanese owners. That in said month of October, 1920, said vessel was in the port of Cardiff, Wales. That on or about the 27th day of October, 1920, plaintiff, the California and Oriental Steamship Company acting through and by its General Manager, purchased said steamship, for a valuable consideration from her Japanese owners, for the sole account of said California and Oriental Steamship Company. That instead of having the bill of sale from said Japanese owners run from them to plaintiff, the California and

Oriental Steamship Co., said corporation, acting through and by its said General Manager, caused said bill of sale to run and be made to one A. Mathiesen, of Kristiania, Norway, a citizen of the Kingdom of Norway, and said bill of sale was made to and the legal title to said steamship was so transferred to said A. Mathiesen. That said A. Mathiesen did not pay any consideration whatsoever for said vessel, or for having said bill of sale of her run to him, or for [9] having the legal title to said steamship so vested in him. That the legal title to said steamship was by plaintiff, acting through and by its said General Manager, so transferred to said A. Mathiesen, and by him accepted, to be by him held in trust for plaintiff corporation, solely in order that said steamship might be operated for the sole account of plaintiff corporation, under Norwegian registry and the flag of the Kingdom of Norway, and said A. Mathiesen never, either at that time or afterward, claimed or pretended to claim any right to the possession of said steamship or any beneficial interest in said steamship, or to hold her or the legal title to her otherwise than for the sole use, account and benefit of plaintiff corporation. That ever since the said steamship was so purchased, and from the time the legal title to her was so transferred to A. Mathiesen, said steamship has been in the sole possession of plaintiff corporation and operated by and at the expense of and for the sole account of plaintiff corporation and never by or for the account or at the expense of said A. Mathiesen, and at no time has said A.

Mathiesen claimed to operate her or that she was being operated for his account, or otherwise than for the sole account of plaintiff corporation.

VI.

Plaintiff avers upon information and belief that during the month of January, 1921, said A. Mathiesen endorsed said bill of sale in blank and delivered the same to defendant, Norsk Hydro, and authorized said Norsk Hydro to make said transfer run to said Norsk Hydro or its nominee; and thereafter said Norsk Hydro made said transfer run to defendant, Bjarne Eriksen, an officer of said Norsk Hydro, as above alleged, and that said defendant Bjarne Eriksen thereupon caused said steamship [10] to be registered in the Kingdom of Norway in his name. That defendant Bjarne Eriksen, by reason of said transaction, now claims to be the legal owner of said steamship and to hold the legal title thereto, for the sole use and benefit of defendant Norsk Hydro, and defendant Norsk Hydro claims that defendant Bjarne Eriksen holds legal title thereto for the sole use and benefit of defendant Norsk Hydro, and said defendants claim the right to the possession and use of said steamship, and that plaintiff corporation has no interest of any kind, or description, either in or to the legal title or the possession or the use of said steamship.

VII.

Plaintiff avers on information and belief that at the time said A. Mathiesen endorsed said bill of sale in blank and delivered it to said Norsk Hydro and authorized said Norsk Hydro to make said

transfer run to said Norsk Hydro or its nominee, and at the time said Norsk Hydro received such delivery and authorization, and at the time said Norsk Hydro caused said transfer to be made to run to defendant Bjarne Eriksen, and at the time said Bjarne Eriksen caused said steamship to be registered in his own name, as aforesaid, said Norsk Hydro knew and had notice, or had information which was sufficient to put a prudent man upon inquiry which would have led to the knowledge and notice that said A. Mathiesen held only the bare legal title to said steamship, and that he held the same in trust solely for the plaintiff corporation, and that the plaintiff corporation was the sole beneficial owner of said vessel and solely entitled to the possession and use of her, and was the sole real or equitable owner of her, and in actual possession of said steamship and operating her for [11] the sole account of plaintiff corporation, and at its expense.

VIII.

Plaintiff avers on information and belief that said Norsk Hydro paid no good, sufficient or valuable consideration or equivalent for the aforesaid endorsement and delivery to it by said A. Mathiesen of said endorsed bill of sale and the aforesaid authorization to make said transfer run to it or its nominee, or for said endorsement or for said delivery or for said authorization, either to said A. Mathiesen, or to plaintiff corporation or to anyone whomsoever; and that, on the contrary, said endorsement, delivery and authorization were wholly without good, suffi-

cient or valuable consideration, and said Norsk Hydro received said endorsement, delivery and authorization as a mere volunteer. That neither said endorsement nor said delivery nor said authorization was directed or authorized to be made or made by plaintiff corporation, and said endorsement, delivery and authorization were made and given without the knowledge or consent of plaintiff corporation. That neither said endorsement nor said delivery nor said authorization was made for the account or benefit or use of plaintiff corporation, and plaintiff corporation derived no benefit therefrom.

IX.

Plaintiff avers on information and belief that at the time said defendant Norsk Hydro made said bill of sale or transfer run to said defendant Bjarne Eriksen, and at the time defendant Bjarne Eriksen caused said steamship to be registered in Norway in his own name, said Bjarne Eriksen knew and had notice, or had information which was sufficient to put a prudent man upon inquiry which would have let to the knowledge and notice of all of the matters of which Norsk Hydro knew and had notice, as alleged in paragraph VII above, and knew and had [12] notice that Norsk Hydro had paid no consideration or equivalent for said endorsement or said delivery or said authorization to make said transfer run to said Norsk Hydro or its nominee, and that plaintiff corporation was the sole beneficial owner of said steamship and solely entitled to the possession and use of her, and was the sole real or equitable owner

of her, and in actual possession of said steamship and operating her for the sole account of plaintiff corporation, and at its expense.

X.

Plaintiff avers on information and belief that defendant Bjarne Eriksen paid no good, sufficient or valuable consideration or equivalent for making the aforesaid transfer run to defendant Bjarne Eriksen, either to said A. Mathiesen, or to said Norsk Hydro or to plaintiff corporation, or to anyone whomsoever, and that, on the contrary, said transfer was by said Norsk Hydro made to run to defendant Bjarne Eriksen for no good, sufficient or valuable consideration and said Bjarne Eriksen received said transfer as a mere volunteer. That said transfer to defendant Bjarne Eriksen was not directed or authorized to be made or made by plaintiff corporation, and said transfer was made wholly without the knowledge or consent of plaintiff corporation. The *the* registry of said steamship in the name of defendant Bjarne Eriksen was not directed or authorized to be made or made by plaintiff corporation, and the resignation of said steamship in the name of said defendant was wholly without the knowledge or consent of said plaintiff corporation. That neither said transfer to defendant Bjarne Eriksen nor the registry of said steamship in his name was made for the use or account or benefit of plaintiff corporation, and plaintiff corporation derived no benefit there from. [13]

XI.

That by virtue of the premises defendants herein

hold such title or interest as they or either of them took to said steamship "Pacifico," through or by the acts hereinbefore set forth, as trustees in trust for the sole benefit, account and use of plaintiff corporation, but claim to hold said steamship for the sole benefit, use and account of defendants, uncharged with any trust or equity in favor of plaintiff corporation and that plaintiff corporation has no equity or interest of any kind therein; and said claim of defendants is hostile to plaintiff corporation and in derogation of its rights and equities, and constitutes such a cloud on the title and the equities of plaintiff corporation in said steamship, and on the right of plaintiff corporation to the possession and beneficial use of said steamship that plaintiff corporation is hindered in the operation and enjoyment and use of said steamship, and in the procuring of credit upon the security of said steamship for her operation, and in the procuring of charters and contracts of affreightment for said steamship, and necessary material, supplies and labor for the operation of said steamship, and the operation or use of said steamship is rendered impossible until the titles, trusts, equities and rights of the parties to this bill are determined and adjudged.

XII.

That defendant Bjarne Eriksen came to the City and County of San Francisco as an officer of said defendant Norsk Hydro, and in his individual capacity, for the purpose of representing said defendants in and about their claims to said steamship, and all parties concerned with or in all legal and

[14] equitable titles or claims to said steamship are now within the jurisdiction of this Honorable Court, and it is in a position to make determination of the rights of plaintiff and defendants to said steamship, both legal and equitable.

XIII.

That by reason of the premises and the hostile claims of said defendants, plaintiff corporation has suffered great, immediate and irreparable damage and loss of property and property rights of plaintiff and the use and earnings and benefit of said steamship. That said steamship "Pacifico" is an article of personal property of a special kind, and of unique and individual character, and of special and peculiar value to plaintiff and cannot be replaced and her value and the value of her and of her use to plaintiff cannot be estimated or computed with certainty. That the value of said ship is in excess of the sum of $350,000. That the plaintiff will continue to suffer great and irreparable damage and loss of property and property rights, and the use and earnings and benefit of said steamship unless the relief herein prayed for is granted. That plaintiff is without any adequate remedy at law or admiralty in the premises. That unless defendants be restrained and enjoined from so doing they will remove said steamship from the jurisdiction of this Honorable Court and will use her for their benefit and subject her to the risk of loss and destruction by perils of the sea and accidents and disasters of navigation, all to the irreparable damage and injury of plaintiff.

XIV.

That by reason of the premises plaintiff has been damaged in a large sum of money by defendants and no part of such damages have been paid by defendants or otherwise. That [15] such damage is continuing and the exact amount thereof is impossible of ascertainment, at the present time, but plaintiffs pray that his Honorable Court do ascertain by reference to a master or otherwise the extent and amount of such damages, and that plaintiff have judgment against defendants for the amount so ascertained, together with a reasonable attorneys' fee incurred by plaintiff in this action.

WHEREFORE plaintiff prays:

First: That said defendants and each of them and their agents, officers, directors, servants and attorneys, be restrained and enjoined from removing said steamship or any of her engines, boilers, apparel, tackle or furniture or equipment, or any part thereof from the jurisdiction of this Honorable Court pending the determination of this suit, and from selling, alienating, or in any manner encumbering or in any way disposing of the same, or attempting so to do or in any way using or operating or interfering therewith, or attempting so to do.

Second: That defendants be ordered, declared and decreed to hold such title or interest in said steamship as they acquired by reason of said transfer from A. Mathiesen and said transfer to Bjarne Eriksen and the registry of said steamship in the name of said Bjarne Eriksen, as trustees thereof for the sale use, benefit and account of the Cali-

fornia and Oriental Steamship Company, and that it be declared and decreed that said defendants have and that neither of them has any title or beneficial interest or rights in or to said steamship "Pacifico" or her engines, boilers, furniture, tackle, apparel or equipment or any part thereof, and that said trust in defendants be enforced and executed; and that it be ordered, declared and decreed that plaintiff, California and Oriental Steamship Company, is the sole beneficial and equitable owner of said steamship "Pacifico," her engines, boilers, [16] tackle, apparel, furniture and equipment, and entitled to the sole possession and use thereof.

Third: That defendants be ordered and compelled to deliver to plaintiff, the California and Oriental Steamship Company, a bill or bills of sale transferring and conveying to said California and Oriental Steamship Company, or to such other person as it may designate, all right, title, claim and interest of said defendants in and to said steamship and her engines, boilers, tackle, furniture, apparel and equipment, and the whole thereof.

Fourth: That defendants be ordered and compelled to surrender and deliver up to the California and Oriental Steamship Company or to such person as it may designate, all and every document or documents which said A. Mathiesen delivered to defendant, Norsk Hydro, and all and every the document or documents which Norsk Hydro delivered to defendant Bjarne Eriksen transferring or purporting to transfer any title, interest or right in said steamship, her engines, boilers, tackle, apparel,

furniture or equipment to said defendants or either of them.

Fifth: That pending the determination of this suit, said defendants be restrained and enjoined from in any way or manner interfering with the possession or use of the California and Oriental Steamship Company or its officers, agents and servants of said steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment, and be enjoined from interfering with plaintiff's possession thereof.

Sixth: That forthwith upon the filing of this bill of complaint, a temporary restraining order be issued by this Honorable Court restraining said defendants and each of them from removing said steamship "Pacifico," or any of her engines, boilers, apparel, tackle, furniture or equipment or any part [17] thereof from the jurisdiction of this Honorable Court, and from encumbering, selling or in any way disposing of the same, and from in any manner using or operating or interfering therewith the possession thereof from the time that defendants shall have knowledge of the existence thereof.

Seventh: That the amount of damages caused to plaintiff by the acts of defendants herein complained of be ascertained by a reference to a master or otherwise, and that plaintiffs have judgment therefor and for the amount of a reasonable attorney's fee incurred by plaintiff in this action, against defendants.

Eighth: That plaintiff may have such other and

further relief and remedy in the premises as *may just* and equitable, including its costs.

LOUIS FERRARI,
BELL, BROOKMAN, SIMMONS & CREECH,
Attorneys for Plaintiff.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Richard Fitzpatrick, being first duly sworn, deposes and says that he is an officer of the California & Oriental Steamship Company, the plaintiff in the above complaint, and as such authorized to make this verification on behalf of plaintiff herein named; that he has read the foregoing Bill of Complaint and knows the same is true of his own knowledge except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

RICHARD FITZPATRICK.

Subscribed and sworn to before me, this 15th day of July, 1921.

[Seal] THOMAS S. BURNES,
Notary Public in and for the City and County of San Francisco, State of California. [18]

That on the 6th day of August, 1921, there was presented to the Judge of the above-entitled court a petition in said cause by the plaintiff for the appointment of a receiver, reading:

PETITION FOR APPOINTMENT OF A RECEIVER AND FOR AN INJUNCTION PENDENTE LITE.

Your petitioner respectfully petitions this Court for its order appointing a receiver and for an injunction *pendente lite* and as a ground for said petition alleges as follows:

I.

This petitioner refers to the allegations contained in the complaint on file in this action and by reference incorporates said allegations herein as fully in all respects as though again and herein set out.

II.

Since the purchase by petitioner, The California & Oriental Steamship Co., of said steamship "Pacifico" on or about the 27th day of October, 1920, all as in said complaint set forth, said steamship has been operated by and at the expense of and for the sole account of this petitioner. At all of said times and at the present time said steamship has been in the direct charge of one H. J. Hammer as master. Up till on or about the 15th day of July, 1921, said H. J. Hammer as master of said steamship "Pacifico" received, obeyed and followed all orders and instructions delivered to him by this petitioner and operated said vessel in accordance therewith. On or about the 15th day of July, 1921, and since said steamship has been in the waters of San Francisco Bay, said H. J. Hammer failed and since has failed to obey and act in compliance with the [19] orders and instructions given to him as mas-

ter of said steamship "Pacifico" by this petitioner, incident to the management, control and operation of said steamship "Pacifico." This petitioner is informed and believes and basing his allegations on that ground alleges that said H. J. Hammer, as master of the said steamship "Pacifico," has since the 15th day of July, 1921, obeyed and complied with the instructions and orders given to him by said defendant, Norsk Hydro. This petitioner is informed and believes, and basing his allegations on that ground alleges, that said Norsk Hydro claims to be entitled to the immediate possession and control of said steamship "Pacifico" and intends and will, unless restrained by the order of this Court, endeavor to operate, and incident to the said operation, remove same from the jurisdiction of this Court. The claims of said defendant to operate said steamship "Pacifico" for the sole use and benefit of and to the sole account of said defendants are hostile to the interest, right and title of said petitioner in said steamship and because of said hostile claims of said defendants it is impossible for this petitioner to procure charters and contracts of affreightment for the said steamship and necessary materials, supplies and labor required for the operation of the said steamship.

In order to procure the material evidence necessary to present to this Court in order to permit this Court to be fully advised as to the issue herein involved and in order to permit this Court to fully and equitably adjudicate the right, title and interest of various parties herein involved it will be

necessary to procure the attendance of or take the depositions of A. Mathiesen, residing at Kristiania, Norway, and other witnesses now residing beyond the jurisdiction of this Court. [20] Because of this fact it will be impossible to bring the above-entitled cause to final hearing and trial on the merits for a period of several months.

Said steamship "Pacifico" is a vessel of a value in excess of $350,000, and said steamship and her apparel and equipment are subject to serious depreciation in value by virtue of nonusage and those legally and equitably entitled to the use, earnings and benefit of said steamship will suffer great and irreparable injury if said steamship is not operated for the length of time necessary to permit of a full and final adjudication by this Court upon the right, title and interest in and to said steamship.

In order to conserve the property of said steamship and in order to protect the right and interest of those entitled to the operation, use, earnings and benefits in and to said steamship it is necessary that this Court appoint a receiver to take charge of said steamship and her equipment and apparel and to operate, manage and control the same during and pending the final adjudication by this Court of the rights of the parties hereto in and to said steamship and the use and earnings thereof.

WHEREOF this petitioner prays:

First: That this Court by its order appoint a receiver to take over the management, operation and control of said steamship "Pacifico," together with her engines, boilers, furniture, tackle, apparel and

equipment for the use and benefit and account of such party or parties as this Court may finally determine is or are legally and equitably entitled thereto.

Second: That pending the final determination of this suit this Court issue an injunction restraining and enjoining all parties hereto from in any [21] way or manner interfering with the possession or use of the receiver appointed by this Court or his officers, agents or servants in and to said steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment.

Third: For such other, further and additional relief as in the premises may seem just and equitable.

BELL, BROOKMAN, SIMMONS & CREECH.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Louis Ferrari, being first duly sworn, deposes and says that he is an officer, to wit, Acting Secretary of the California & Oriental Steamship Company, the petitioner in the above petition, and as such authorized to make this verification on behalf of petitioner herein named; that he has read the foregoing petition and knows the contents thereof, that same is true of his own knowledge except as to matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

LOUIS FERRARI.

Subscribed and sworn to before me this 6th day of August, 1921.

[Seal] VIRGINIA A. BEEDY,

Notary Public in and for the City and County of San Francisco, State of California. [22]

That upon the presentation of said petition, and on the same day, said Judge made an order directing the defendants to show cause why a receiver should not be appointed as petitioned for by the plaintiff, said order reading:

ORDER TO SHOW CAUSE.

On reading the petition and complaint of the California & Oriental Steamship Co., a corporation, petitioner herein, and the same being filed in the above-entitled cause and sufficient cause appearing therefor,

IT IS HEREBY ORDERED that Norsk Hydro Electris Kvalstof Aktieselskab and Bjarne Eriksen and each of them be and appear before this Court in open court at the courtroom thereof on the 8th day of August, 1921, at 10 o'clock A. M. thereof, to show cause, if any there be, why a receiver should not be appointed by this Court to take charge, manage and operate the steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment, pending the final determination of this cause and why this Court should not further issue an injunction restraining them, the said Norsk Hydro Electris Kvalstof Aktieselskab and Bjarne Eriksen, and all parties to the above-entitled cause from in any way or manner interfering with the possession or use of the receiver appointed by this Court or his

officers, agents or servants in and to said steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment.

AND IT IS FURTHER ORDERED that a copy of this order certified under the hand of the clerk and seal of this court, together with copy of petition herein in support thereof be served upon said Norsk Hydro Electris Kvalstof Aktieselskab and Bjarne Eriksen, and each of them.

(Signed) WM. C. VAN FLEET,
Judge. [23]

That on said 6th day of August, 1921, defendants served and filed their answer. That the body of said answer and its verification read:

ANSWER.

Now come the defendants Norsk Hydro Electrisk Kvalstof Aktieselskab, a corporation, hereinafter for the sake of brevity referred to as "Norsk Hydro," and Bjarne Eriksen, and answering the bill of complaint of plaintiff herein admit, deny and allege as follows:

I.

Answering the allegations of subdivision V of said complaint, the defendants deny that the plaintiff on or about the 27th day of October, 1920, or at any other time, purchased the steamship known as the "Pacifico" and mentioned in said complaint. The defendants also deny that upon the purchase of said steamship from its former Japanese owners the plaintiff caused the bill of sale evidencing said purchase to run or be made to one A. Mathiesen mentioned in the complaint, or to anyone else.

Defendants further deny that the legal title to said vessel transferred to said Mathiesen was so transferred to be by him held in trust for the plaintiff, or that said steamship or the legal title thereto was at any time held by said Mathiesen in trust for the plaintiff or for its use, account or benefit. Defendants further deny that said steamship has been at any time, or is now, in the possession of the plaintiff, or has been or is being operated by or at the expense of or for the account of plaintiff, or that said Mathiesen has at any time claimed to operate, or has operated, said steamship for the account of plaintiff. [24]

II.

Answering the allegations of subdivision VII of the complaint, the defendants deny that at or prior to the defendant Norsk Hydro taking a bill of sale from said Mathiesen as alleged in subdivision VI of the complaint, and giving the full consideration given by it therefor, the defendants, or either of them, knew or had notice that said Mathiesen held the legal title to said vessel in trust for anyone other than one C. Henry Smith or had information which was sufficient to put a prudent man upon an inquiry which would have led to knowledge or notice that the legal title to said vessel was held by said Mathiesen in trust for anyone other than said Smith, or that anyone other than said Smith was a beneficial owner of said vessel or entitled to her possession or use, or that anyone other than said Smith was in actual possession of said vessel or operating her for account of anyone except said Smith; and in

this behalf the defendants allege that said bill of sale was made by said Mathiesen to the defendant Norsk Hydro at the instance of said Smith and for a valuable consideration given to him by the defendant Norsk Hydro in the full and genuine belief that he was the sole beneficial owner of said vessel.

III.

Answering the allegations of subdivision VIII of said complaint, the defendants deny that the defendant Norsk Hydro did not pay a good, sufficient and valuable consideration for the endorsement and delivery to it by said Mathiesen of the bill of sale for said vessel as alleged in the complaint, or for the authorization to said defendant, alleged in the complaint, to make said transfer run to it or to its nominee, and in this behalf allege [25] the fact to be that at the time of the endorsement and delivery of said bill of sale and the making of the aforesaid authorization, the defendant Norsk Hydro did pay a good, sufficient and valuable consideration therefor. Defendants further deny that said endorsement, delivery and authorization, or any of them, were without a good, sufficient or valuable consideration given by said Norsk Hydro, or that the same were received by said Norsk Hydro as a volunteer.

IV.

Answering the allegations of subdivision IV of the complaint, defendants deny that the defendant Eriksen ever knew or now knows, or ever had notice or now has notice that the defendant Norsk Hydro paid no consideration for the endorsement or de-

livery of said bill of sale or for the authorization to make the transfer of said vessel run to said Norsk Hydro or to its nominee, or that the plaintiff was the beneficial owner of said vessel or entitled to her possession or use, or was her real or equitable owner, or was in actual possession of her, or was operating her for the account of the plaintiff or at its expense.

V.

Answering the allegations of subdivision X of the complaint, the defendants admit that the defendant Eriksen paid no consideration for having the legal title to said vessel transferred to him, and allege in this behalf that he holds said legal title for and on account of the defendant Norsk Hydro and for and on its account alone. [26]

VI.

Answering the allegations of subdivision XI of the complaint, the defendants deny that they or either of them hold any title or interest in said vessel in trust for the plaintiff, or for the plaintiff's benefit, account or use, and deny that the plaintiff has any right, title or equity in said vessel.

VII.

Answering the allegations of subdivision XIII of the complaint, the defendants deny that the plaintiff has suffered any damage or loss of property or property rights by reason of the premises contained in the complaint or of the claims of the defendants, or of either of them, to said vessel, and defendants further deny that said steamship "Pacifico" is an article of personal property of a special kind or of

unique or individual character or of special or peculiar value to plaintiff, or that she cannot be replaced or that her value and the value of her use to the plaintiff cannot be estimated or computed with certainty. The defendants further deny that the value of said vessel is in excess of three hundred and fifty thousand (350,000) dollars, or that said vessel is of a present value approximating that amount. The defendants further deny that the plaintiff will continue to suffer any damage or loss of property or property rights unless the relief prayed for in the complaint is granted. The defendants further deny that the plaintiff is without any adequate remedy at law or in admiralty. The defendants admit that they intend to use said vessel for the benefit of the defendant Norsk Hydro and that as a necessary incident of such use she will be sent to sea and thereby subjected to the risk of loss and destruction by perils of the sea [27] and accidents and disasters of navigation, but deny that the same will be of any damage or injury to the plaintiff.

VIII.

Answering the allegations of subdivision XIV of the complaint, defendants deny that plaintiff has been damaged by the defendants in any sum of money whatsoever.

For a second and further, separate and distinct defense to the complaint, the defendants allege:

I.

That on or about the 27th day of October, 1920, the steamship mentioned in the complaint was a

vessel registered under the laws of the Empire of Japan under the name of "Taiga Maru" and was owned by citizens of said Empire. That on or about said date said vessel was purchased from said owners by one C. Henry Smith as the ostensible purchaser. That upon said purchase being made, said Smith caused said vessel to cease to be registered under the laws of the Empire of Japan and to be registered under the laws of the Kingdom of Norway under the name "Pacifico," and with one A. Mathiesen, a citizen of said Kingdom, as the registered owner thereof. That said A. Mathiesen accepted and held the registered ownership of said vessel as aforesaid in trust for said Smith as the sole beneficial owner and for no one else. That at the time of said purchase said Smith took possession of said vessel and remained in possession of her until he delivered such possession to the defendants [28] as hereinafter alleged. That the plaintiff permitted the said Smith to purchase said vessel as himself the ostensible purchaser, to cause her to be transferred as aforesaid to a Norwegian register in the name of said Mathiesen as owner, to have said Mathiesen accept and hold such registered ownership in trust for said Smith and no one else, and to take and retain possession of said vessel. That until on or about the 20th day of April, 1921, the plaintiff made no claim that it was the true beneficial owner of said vessel or had any interest therein, took no steps to inform said Mathiesen that it was or claimed to be the beneficial owner of said vessel, took no steps to require of said Mathiesen

that he hold the legal title to said vessel in trust for it instead of said Smith, and took no steps to secure possession of said vessel. That by reason of the aforesaid facts the plaintiff permitted the said Mathiesen and Smith to be clothed with all the indicia of title and ownership to said vessel as the legal and beneficial owners thereof, respectively, and to remain so clothed until on or about the said 20th day of April, 1921.

II.

That long prior to said 20th day of April, 1921, and while said Mathiesen and Smith were clothed with the indicia of title and ownership of said vessel, as aforesaid, and on or about the 17th day of January, 1921, the defendant Norsk Hydro purchased the legal and beneficial ownership of said vessel for a consideration and under circumstances as follows:

That the defendant Norsk Hydro was and is a considerable manufacturer of nitrates. That for a considerable period prior to the 17th day of January, 1921, it had engaged in a course of [29] business with said Smith whereby it sold him nitrates manufactured by it to be resold by him, or whereby it delivered nitrates to him to be sold by him for it upon a *del credere* commission. That in pursuing said course of business it was the custom between said defendant and said Smith for the former to deliver nitrates to the latter without requiring payment therefor in advance of delivery, the amount of the purchase price being charged by said defendant against Smith upon an open account be-

tween them. That on the 17th day of January, 1921, and for some time prior thereto, Smith was and had been indebted to said defendant upon said open account in the amount of approximately one hundred and fifty thousand (150,000) dollars. That while Smith was so indebted to it, and prior to the 17th day of January, 1921, the defendant refused to deliver further nitrates to said Smith without payment therefor upon delivery, unless Smith should pay or adequately secure said account. That said Smith thereupon, and prior to said 17th day of January, 1921, offered to cause said steamship "Pacifico" to be transferred to said defendant or its nominee as security for said account, provided the defendant would thereafter continue to deliver nitrates to him without requiring, as a condition thereof, the payment of the purchase price therefor, but would allow such price to be charged against him upon said open account. That immediately prior to the 17th day of January, 1921, there was expected to arrive in California a consignment of nitrates shipped by the defendant Norsk Hydro to said Smith. That said defendant refused to deliver to Smith the shipping documents for said consignment so that Smith might obtain delivery of the same upon arrival. That said consignment arrived and was stored and held for the account of said defendant. That the purchase price of said consignment was approximately ninety thousand [30] (90,000) dollars. That thereafter, and prior to the 17th day of January, 1921, said defendant agreed to said offer of said Smith, and thereupon, and in

performance thereof, and on the 17th day of January, 1921, the said Smith caused said Mathiesen to transfer said vessel to the defendant by the endorsement and delivery to the latter of the bill of sale therefor, and thereupon said defendant, in consideration therefor, caused said consignment of nitrates hereinbefore last mentioned to be delivered to said Smith without payment of the purchase price therefor, charging said purchase price against said Smith upon said open account. That by reason of the matters just hereinbefore alleged, the balance due from said Smith to said defendant upon said open account was increased to the sum of approximately two hundred and forty thousand (240,000) dollars. That no part of said balance has been paid and the same is now due and payable by said Smith to said defendant.

III.

That said defendant accepted said bill of sale in the full and genuine belief that said Mathiesen as the registered owner of said vessel held the legal title thereto in trust for said Smith and no one else, and that said Smith and no one else was the beneficial owner thereof. That until long after the occurrence of the matters alleged in the last preceding subdivision of this answer, neither of the defendants had notice or knowledge that said Smith was not the sole beneficial owner of said vessel and had no notice or knowledge of facts or circumstances which would have put a reasonably prudent man upon inquiry as to his ownership. [31]

IV.

That after the receipt of said bill of sale as aforesaid the defendant caused the name of the defendant Eriksen to be inserted as the buyer in said bill of sale and by virtue of said bill of sale caused the registered ownership of said vessel to be transferred from the said Mathiesen to said Eriksen. That said defendant Eriksen thereupon took and received possession of said vessel from said Smith. That said Eriksen holds said registered ownership and possession for and as the agent of the defendant Norsk Hydro and as security to the latter for the payment of said indebtedness, two hundred and forty thousand (240,000) dollars, of said Smith.

And for a third and further, separate and distinct defense, defendants allege upon information and belief:

I.

That on or about the 19th day of October, 1920, said C. Henry Smith hereinbefore mentioned and certain other individuals agreed together to purchase from her then Japanese owners, as hereinbefore alleged, the steamship mentioned in the complaint. That for purposes of convenience it was agreed by said Smith and said individuals to use the plaintiff as a temporary organization representing their association together in the enterprise of purchasing and owning said vessel, but that plaintiff itself was not to have any interest in said vessel. That said individuals agreed to contribute sixty thousand (60,000) dollars toward the purchase price of said vessel. That the purchase [32] price of

said vessel was approximately three hundred and fifty thousand (350,000) dollars. That it was agreed that the actual purchasing of the vessel and its operation thereafter should be done by said Smith, and that a portion of the purchase price should or might be obtained by mortgaging the vessel. That said Smith did purchase said vessel from her then Japanese owners as hereinbefore alleged, but instead of mortgaging the vessel to obtain a portion of the purchase price, he actually paid the full purchase price with his own funds. That thereafter said individuals through the instrumentality of the plaintiff paid said Smith the sixty thousand (60,000) dollars which they had agreed to contribute toward the purchase price of said vessel as aforesaid, but with the exception of said sixty thousand (60,000) dollars said Smith has not been reimbursed and there has not been repaid to him or tendered to him any part of the purchase price of said vessel so paid by him with his own funds. That the amount of the purchase price for which he has not been reimbursed is approximately two hundred and ninety thousand (290,000) dollars.

II.

That upon the making of said purchase said Smith took possession of said vessel and caused her to be registered under the laws of the Kingdom of Norway in the name of A. Mathiesen, as hereinbefore alleged. That said Smith remained in possession of said vessel until she was transferred to the defendants as hereinbefore alleged. That said Smith caused said Mathiesen to accept said regis-

tered ownership upon the trust that he would hold the same for the account and subject to the order of said Smith. That by reason of the foregoing facts said Smith had, in case said purchase were in reality for the account of the [33] plaintiff as alleged in the complaint, an equitable lien upon said vessel for the reimbursement to him of the amount of the purchase price therefor which he had paid and for which he had not been reimbursed. That thereafter, and as hereinbefore alleged, said Smith caused said Mathiesen to endorse and deliver to the defendant Norsk Hydro the bill of sale for said vessel as security for the sum of two hundred and forty thousand (240,000) dollars due by said Smith to said defendant. That under and by virtue of said endorsement and delivery of said bill of sale all of the rights, interests and equities of said Smith in and concerning said vessel passed to said defendant. That under and by virtue of said bill of sale said defendant Norsk Hydro caused the registered ownership of said vessel to be transferred to defendant Eriksen.

III.

That the plaintiff was not entitled to require of said Smith the transfer to it of the control, possession or title of or to said vessel, or to require that it be acknowledged by said Mathiesen as he beneficial owner instead of Smith, or to have the registered ownership of the vessel transferred to one who would hold it for the account or benefit of the plaintiff without repaying the said Smith the said sum of approximately two hundred and ninety thousand

(290,000) dollars which he had furnished as aforesaid toward the purchase price of said vessel and for which he had not been reimbursed. That after the endorsement and delivery of said bill of sale to the defendant Norsk Hydro by said Mathiesen at the instance of said Smith, the plaintiff was not, and is not now, entitled to have transferred to it the control, possession or title of or to said vessel or to be acknowledged [34] by the registered owner thereof as her beneficial owner or to have her registered ownership transferred to one who would hold it for the account or benefit of plaintiff, without repaying to said Norsk Hydro, as the successor in interest of said Smith, the said sum of approximately two hundred and ninety thousand (290,000) dollars. That the plaintiff has at no time tendered or offered to pay either said Smith or said defendant the amount of the purchase price which said Smith furnished as aforesaid and for which he had not been reimbursed, or any part thereof.

For a fourth and further, separate and distinct defense the defendants allege:

I.

That by the laws of the Kingdom of Norway, under which the vessel mentioned in the complaint herein is registered, and to which said vessel and all interests therein, both legal and beneficial, are subject, it is and has been since July 21, 1916, unlawful and prohibited, both that either the legal or beneficial ownership of a vessel registered under the Norwegian laws be held by one not a citizen of Norway or by a corporation not organized and existing under the laws of Norway, and that the legal

or beneficial ownership of such vessel be transferred to one not a citizen of Norway, or to a corporation not organized and existing under the laws of Norway. That by the laws of Norway any violation of said prohibition is punishable by fine or imprisonment imposed upon those guilty of such violation, and by a forfeiture of the vessel or interest therein which was the subject [35] of such violation.

II.

That by reason of said prohibition the defendants cannot transfer either the registered or beneficial ownership of said vessel to the plaintiff as prayed for in said complaint without being guilty of a violation of said laws and subjecting themselves to fine and imprisonment, and said vessel to forfeiture. That the defendant Norsk Hydro is a corporation organized and existing under the laws of the Kingdom of Norway and the defendant Eriksen is a citizen and resident of said kingdom.

That plaintiff is not a corporation organized and existing under the laws of said kingdom, and that by reason of that fact and of the said prohibition hereinbefore alleged, the plaintiff may not lawfully become or be either the registered or beneficial owner of said vessel.

WHEREFORE, the defendants having fully answered the complaint, pray for judgment against the plaintiff that it take nothing by this action, and for costs of suit.

McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
McCLANAHAN & DERBY,
Attorneys for Defendants. [36]

State of California,
City and County of San Francisco,—ss.

Bjarne Eriksen, being first duly sworn, deposes and says: That he is one of the defendants named in the foregoing answer; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true.

BJARNE ERIKSEN.

Subscribed and sworn to before me this 6th day of August, 1921.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California. [37]

That at the time and place specified in said order to show cause the defendants appeared and a hearing was had. In support of the petition the plaintiff presented its complaint and verified petition hereinbefore set out. In opposition, the defendants presented their answer hereinbefore set out and the affidavits of S. H. Derby, J. H. Hammer, C. Henry Smith and Bjarne Eriksen. Said affidavits, omitting the captions and verifications, read:

AFFIDAVIT IN RESISTANCE OF PETITION FOR APPOINTMENT OF RECEIVER AND FOR AN INJUNCTION PENDENTE LITE.

State of California,
City and County of San Francisco,—ss.

S. H. Derby, being first duly sworn, deposes and

says: That he is one of the attorneys for the defendants in the above-entitled action. That he has read the petition of the plaintiff in said action for the appointment of a receiver and knows the contents thereof. That the statement in said petition that up until on or about the 15th day of July, 1921, the master of the steamship "Pacifico" mentioned in said petition obeyed and followed the orders and instructions delivered to him by the plaintiff and operated said vessel in accordance therewith, is wholly untrue. That on the 31st day of May, 1921, said plaintiff filed a libel in admiralty in the First Division of the above-entitled court, alleging that it was the true and lawful owner of said vessel and that possession thereof was withheld from it by said master and one C. Henry Smith, and praying for a judgment of said Court that possession of said vessel be delivered to it. That a copy of said libel is hereunto attached and made a part hereof. That thereafter, and on or about the 23d day of July, 1921, [38] said libel, without having come on for trial and without the plaintiff having obtained possession of said vessel, was dismissed by the plaintiff.

That said vessel had been in the harbor of San Francisco continuously since before the date of the filing of said libel, to wit, the 31st day of May, 1921. That at that time, and at all times since, the plaintiff has been aware of the claim of the defendants that they were the legal and beneficial owners of said vessel, and plaintiff had ample opportunity to apply for the relief now sought. That on or about the

16th day of July, 1921, plaintiff brought the above-entitled action, alleging in its complaint that it was the beneficial owner of said vessel. That thereafter, and on the 22d day of July, 1921, plaintiff and the defendants agreed, through their respective attorneys, that the defendants would not send said vessel to sea for a period of twenty (20) days thereafter. That the purpose of said agreement was to afford the plaintiff an opportunity to apply for an injunction *pendente lite,* restraining the sending of said vessel to sea, or for obtaining such other relief of a similar nature as plaintiff might desire. That thereafter, and on or about the 25th day of July, 1921, the attorneys for the plaintiff were informed by letter by the attorneys for the defendants that the latter must insist, for reasons stated in said letter, that such application be made at as early a date as possible. That a copy of said letter is hereunto attached and made a part hereof. That it was possible for the plaintiff to immediately make such application. That nevertheless the plaintiff delayed making such application until the 6th day of August, 1921, and that such delay was without any excuse whatsoever, so far as affiant is aware.

(Signed) S. H. DERBY. [39]

(Copy of libel referred to in foregoing affidavit.)

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. ——.

THE CALIFORNIA & ORIENTAL STEAMSHIP CO., a Corporation,

Libelant,

vs.

Norwegian Steamship "PACIFICO," Her Engines, Boilers, Tackle and Furniture; H. J. HAMMER and C. HENRY SMITH,

Respondents.

LIBEL FOR POSSESSION AND RESTITUTION.

To the Honorable M. T. DOOLING, Judge of the Above-entitled Court:

The libel of California & Oriental Steamship Company, a corporation, against the Norwegian Steamship "Pacifico," her engines, boilers, tackle and furniture and against C. Henry Smith and against H. J. Hammer, and also against all persons lawfully intervening for their interest in said steamer, in a cause of possession, civil and maritime, allege as follows:

I.

That libelant, California & Oriental Steamship Company is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business

in the City and County of San Francisco, State of California. [40]

II.

That said steamship "Pacifico" is a Norwegian vessel of about 5453 tons dead weight, whereof one H. J. Hammer is, or was lately, master, and that the said steamship "Pacifico" is now lying in the port of San Francisco.

III.

That libelant is the true and lawful owner of said steamship "Pacifico"; that the possession of the said steamship is wrongfully withheld from the said libelant by the said H. J. Hammer and C. Henry Smith on an alleged ground of title to the possession of said vessel; that the said claim of title to the possession of said vessel is entirely false and invalid.

That all and singular the premises are true and within the maritime jurisdiction of this Honorable Court.

WHEREFORE libelant prays that process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against said steamship "Pacifico," her engines, boilers, tackle and furniture and that the said H. J. Hammer and C. Henry Smith and all other persons having or pretending to have any right, title or interest in the said steamship may be cited to appear before this Honorable Court and show cause why possession of said steamer shall not be delivered to libelant and that this Honorable Court will be pleased to decree that the possession of said steamship be delivered to the

libelant and to administer such other and further relief as shall to law and justice appertain and also to condemn said H. J. Hammer and C. Henry Smith and all persons intervening for their interest in said steamship in costs.

BELL, BROOKMAN, SIMMONS & CREECH,

Proctors for Libelant. [41]

State of California,
City and County of San Francisco,—ss.

Richard Fitzpatrick, being duly sworn, deposes and says: That he is an officer, to wit, the Secretary of the California & Oriental Steamship Co., the libelant herein; that he has read the foregoing libel and knows the contents thereof; that same is true of his own knowledge except as to the matters therein stated upon his information or belief, that as to those matters he believes it to be true.

RICHARD FITZPATRICK.

Subscribed and sworn to before me this 31st day of May, 1921.

C. W. CALBREATH,

Notary Public in and for the City and County of San Francisco, State of California,

Deputy Clerk U. S. District Court, Northern District of California. [42]

(Copy of letter referred to in foregoing affidavit.)

July 25, 1921.

Messrs. Bell, Brookman, Simmons & Creech,
Alaska Commercial Building,
San Francisco, California.

IN RE: CALIFORNIA-ORIENTAL STEAMSHIP COMPANY vs. NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB.

Gentlemen:

As you know, we have stipulated that the vessel which is the subject matter of the above litigation shall not be sent by the defendants from this port within twenty days from the 22d of this month. As we understand it, this time was desired by you in order that you might have an opportunity to obtain a preliminary injunction forbidding her removal from this port during the pendency of the litigation.

We desire to say that we must insist upon your application for a preliminary injunction being made immediately so that, if application is made, it may be heard and determined before the expiration of the twenty days mentioned. Our reason for doing this is twofold; we are unwilling, because of the very heavy expense and loss involved, to hold the boat here idle for longer than the stipulated time. In addition to this, Mr. Ericksen, the representative of the Norsk Hydro Elektrisk Kvaelstof Aktieselskab Company, is now here and it is necessary for him to return to Norway at the earliest possible moment. His presence here in connection with resisting any application for an injunction is necessary and he is

remaining for that purpose alone. He cannot remain [43] longer than the twenty days stipulated for, and unless your application is made within such time as to allow us reasonable time before his departure for the preparation of the papers in resistance, we will be compelled to ask for a denial of the application upon that ground.

Yours very truly,
(Signed) McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE. [44]

AFFIDAVIT IN RESISTANCE OF PETITION FOR APPOINTMENT OF RECEIVER AND FOR AN INJUNCTION PENDENTE LITE.

State of California,
City and County of San Francisco.—ss.

H. J. Hammer, being first duly sworn, deposes and says: That he is the master of the steamship "Pacifico" mentioned in the complaint in the above-entitled action, and has been such master ever since the 3d day of November, 1920. That he became such master immediately upon the said vessel being registered under the Norwegian flag with one A. Mathiesen as owner thereof. That as such master he has at all times since on or about said 3d day of November, 1920, been in the exclusive and immediate possession of said vessel. That he was put in possession of said vessel as her master by the firm of Pinkney and Company. That at the time he became master of said vessel he was instructed by said firm to obey [45] and follow all orders and instructions delivered to him by one C. Henry Smith. That he did so follow all orders and instructions delivered

to him by said Smith until after such time as the registered ownership of said vessel was transferred to one Bjarne Eriksen, whereupon, by reason of said transfer, and under instructions received by him from said Smith, he thereafter followed the orders and instructions of said Eriksen. That he has at no time obeyed or followed the orders of any one other than said A. Mathiesen, C. Henry Smith and Bjarne Eriksen with relation to said vessel. That he has at no time received any instructions whatsoever from the plaintiff in the above-entitled action, and that affiant never heard of the plaintiff or was aware of its existence until on or about the 31st day of May, 1921, when the plaintiff filed a libel in the First Division of the above-entitled court seeking to recover from the affiant, as one of the respondents named in said libel, the possession of said vessel.

H. J. HAMMER. [46]

AFFIDAVIT IN RESISTANCE OF PETITION FOR APPOINTMENT OF RECEIVER AND FOR AN INJUNCTION PENDENTE LITE.

State of California,
City and County of San Francisco,—ss.

C. Henry Smith, being first duly sworn, deposes and says: That from the organization of the plaintiff corporation until on or about the 21st day of April, 1921, affiant was the General Manager of the plaintiff. That he was, and is, thoroughly acquainted with its affairs and with its financial condition. That the plaintiff has no assets whatever except a possible beneficial interest in certain claims against certain insurance companies for an aggre-

gate amount of $145,000.00, the legal title to which claims is in the Bank of Italy which claims to be the beneficial owner thereof as well. That the plaintiff is wholly unable to respond to any judgment against it.

That on or about the 9th day of October, 1920, affiant and certain other individuals agreed to associate themselves together in a corporation to be organized under the laws of the Kingdom of Norway for the purpose of purchasing from her then Japanese owners the steamship "Pacifico" mentioned in the complaint in the above-entitled action. That for the purposes of convenience, it was agreed by affiant and said individuals to use the plaintiff as a temporary organization representing their association together in the enterprise of purchasing and owning said vessel, but that plaintiff itself was not to have any interest in said vessel. That said individuals agreed to contribute sixty thousand (60,000) dollars toward the purchase price of said vessel. That the purchase price of said vessel was £98,154—sterling, which at the then prevailing rate of [47] exchange was the equivalent of approximately $338,-753.00. That in addition to the purchase price of the vessel proper, there was also payable to her Japanese owners for stores and materials upon her approximately $10,353.00. That the total purchase price of said vessel, with the stores and materials upon her, was approximately three hundred and fifty thousand (350,000) dollars. That it was agreed between said individuals and affiant that the actual purchasing of the vessel and its operation thereafter

should be done by affiant, and that a portion of the purchase price should or might be obtained by mortgaging the vessel. That affiant did purchase said vessel from her then Japanese owners, but instead of mortgaging said vessel to obtain a portion of the purchase price, he actually paid the full purchase price, to wit, approximately three hundred and fifty thousand (350,000) dollars with his own funds. That thereafter said individuals, through the instrumentality of the plaintiff, paid affiant the sixty thousand (60,000) which they had agreed to contribute toward the purchase price of said vessel as hereinbefore set forth, but that with the exception of said sixty thousand (60,000) dollars, affiant has not been reimbursed and there has not been repaid or tendered to him any part of the purchase price of said vessel so paid by him with his own funds. That the amount of the purchase price for which he has not been reimbursed is approximately two hundred and ninety thousand (290,000) dollars.

That upon the making of said purchase, affiant took possession of said vessel and caused her to be registered under the laws of the Kingdom of Norway in the name of one A. Mathiesen, a citizen and resident of Norway. That affiant remained in possession of said vessel until after she was transferred to [48] the defendants in the above-entitled action as hereinafter alleged. That upon taking possession of said vessel, affiant caused one H. J. Hammer to be appointed her Master, and caused said Hammer to be placed in immediate charge and possession of her. That until said vessel was transferred to the defend-

ants, said Hammer reported exclusively to affiant and said Mathiesen, and followed the order and instructions of affiant with relation to said vessel. That the plaintiff never had possession of said vessel and never gave instructions or orders with relation to her. That said vessel was not operated for or on account of the plaintiff, but affiant himself met and paid all of her operating expenses except such as have been met and paid by the defendants.

That upon the purchase of said vessel as aforesaid, affiant caused said Mathiesen to accept her registered ownership upon the trust that he would hold the same for the account and subject to the order of affiant. That on the 17th day of January, 1921, and for some time prior thereto, affiant was and had been indebted to the corporation defendant, hereinafter for brevity designated as "Norsk Hydro," upon an open account in the sum of approximately one hundred and fifty thousand (150,000) dollars. That said indebtedness had been incurred by affiant for nitrates manufactured by said defendant to be resold by him, or by it delivered to him to be sold for it upon a *del credere* commission. That it had been the custom between said defendant and affiant for the former to deliver nitrates to the latter without requiring payment therefor in advance of delivery, the amount of the purchase price being charged by said defendant against affiant upon said open account. That while affiant was so indebted to said defendant, and prior to the 17th day of [49] January, 1921, said defendant refused to deliver further nitrates to him without payment therefor upon de-

livery, unless he should pay or adequately secure said account. That affiant thereupon, and prior to the 17th day of January, 1921, offered to cause said steamship "Pacifico" to be transferred to said defendant, or its nominee, as security for said account, provided said defendant would thereafter continue to deliver nitrates to him without requiring as a condition thereof the payment of the purchase price therefor, but would allow such price to be charged against him upon said open account. That immediately prior to the 17th day of January, 1921, there was expected to arrive in California a consignment of nitrates shipped by the said defendant to affiant. That said defendant refused to deliver to affiant the shipping documents for said consignment so that he might obtain delivery of the same upon arrival, unless affiant paid for same in advance. That said consignment arrived and was stored and held for the account of said defendant. That the purchase price of said consignment was approximately ninety thousand (90,000) dollars. That thereafter, and prior to the 17th day of January, 1921, said defendant agreed to said offer of affiant, and thereupon, and in performance thereof, and on the 17th day of January, 1921, affiant caused said Mathiesen to transfer said vessel to said defendant by the endorsement and delivery to the latter of the bill of sale therefor, and thereupon said defendant, in consideration therefor, caused said consignment or nitrates hereinbefore last mentioned to be delivered to affiant without payment of the purchase price therefor, charging said purchase price against affiant upon said open account.

That by reason of the matters just hereinbefore set forth, the balance due from affiant to said defendant upon said open account was increased to [50] the sum of approximately two hundred and forty thousand (240,000) dollars. That no part of said balance has been paid.

That affiant did not inform said defendant that the plaintiff or anyone else, other than himself, was the beneficial owner of said vessel, or the owner of any beneficial interest in her, and that so far as affiant is aware, said defendant was not informed by anyone, and did not have either notice or knowledge that anyone other than affiant had or claimed to have any beneficial interest in said vessel. That the individuals heretofore mentioned who contributed the said sixty thousand (60,000) dollars toward the purchase price of said vessel have a beneficial interest in her, but the same is subject to the reimbursement to affiant of the amount of the purchase price of said vessel furnished by him and for which he has not been reimbursed. That the plaintiff has no beneficial interest in said vessel whatever, and no interest of any nature other than such as it may have as the temporary representative or instrumentality of the association of affiant and said individuals who associated themselves with him for the purpose of purchasing said vessel. That the amount of said portion of said purchase price of said vessel is in excess of the amount of the indebtedness of affiant to said defendant, as security for which said bill of sale was endorsed and delivered to said defendant as hereinbefore set out.

That after the receipt of said bill of sale, as aforesaid, and by virtue thereof, said defendant caused the registered ownership of said vessel to be transferred from said Mathiesen to the defendant Eriksen, and thereafter said Eriksen took and received possession of said vessel from affiant. [51]

That neither the plaintiff nor anyone else has tendered or offered to pay affiant the amount of said purchase price which affiant furnished, as aforesaid, from his own funds and for which he has not been reimbursed, or any part thereof.

C. HENRY SMITH. [52]

AFFIDAVIT IN RESISTANCE OF PETITION FOR APPOINTMENT OF RECEIVER AND FOR AN INJUNCTION PENDENTE LITE.

State of California,
City and County of San Francisco,—ss.

Bjarne Eriksen, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action, and is the agent of the other defendant. That in addition to the denials and allegations contained in the answer of the defendants, and which are verified by affiant of his own knowledge, affiant says: That neither the plaintiff nor anyone else has at any time tendered or offered to pay the defendants, or either of them, the portion of the purchase price of the steamship "Pacifico" which C. Henry Smith, on her purchase from her then Japanese owners, furnished from his own funds as alleged in defendant's answer, and for which he has not been reimbursed, or any part thereof. [53]

That affiant further says:

That the defendant, designated in the complaint as "Norsk Hydro," is a corporation of ample means, that it is perfectly solvent, that it is not financially embarrassed in any manner, that its assets far exceed its liabilities and exceed its liabilities in an amount far in excess of the value of said steamship as alleged in the complaint, and far in excess of the true value thereof, and that it is amply able to respond to any judgment which the plaintiff may obtain in the above-entitled action.

BJARNE ERIKSEN. [54]

Thereafter, and by way of rebuttal, the plaintiff presented the affidavits of O. H. Root, Louis Ferrari and G. W. Bell. That said affidavits, omitting the captions and verifications, read:

AFFIDAVIT IN SUPPORT OF PETITION FOR THE APPOINTMENT OF RECEIVER AND FOR INJUNCTION PENDENTE LITE.

State of California,
City and County of San Francisco,—ss.

O. H. Root, being first duly sworn, deposes and says: That he is a resident of Berkeley, County of Alameda, State of California; that the California & Oriental Steamship Company is a corporation organized and existing under and by virtue of the laws of the State of California; that on the 20th day of January, 1919, affiant was elected a director of said corporation, and has since said date been, and now is, a duly elected and acting director of said corporation; that at a meeting of directors held on the said

20th day of January, 1919, affiant was elected vice-president of said corporation, and has since said date been, and now is, the duly elected and acting vice-president of said corporation.

That on the 9th day of October, 1920, at the hour of 1:00 P. M., a meeting of stockholders of the California & Oriental Steamship Company was regularly held at the office of said Corporation, and the following is a full, true and correct copy of the minutes of the proceedings of said meeting:

"STOCKHOLDERS' MEETING
OF THE
CALIFORNIA & ORIENTAL STEAMSHIP
COMPANY. [55]

At the Stockholders' meeting held in San Francisco, this 9th day of October, 1920, at the hour of one o'clock P. M.

C. Henry Smith, President
and
O. H. Root, Vice-Pres.

being present:

It was decided to purchase the "Taigi Maru" at the price of £18-0-0, Eighteen Pounds Sterling, per deadweight ton; all cash after steamer has been thoroughly inspected and passes the Bureau Veritas requirements, where the steamer is classed. It was built 1919; is 5453 tons deadweight. She is now in a Bristol Channel Port, having been dry-docked and painted and ready for Sea.

It was also decided to place the steamer under Norwegian flag, and the ownership of the steamer

will be in the name of the California & Oriental Steamship Company, with a corresponding owner in Norway, according to law there.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY.

C. HENRY SMITH,
President.

O. H. ROOT,
Vice-President.

G. R. STACK,
Secretary.";

that at no other subsequent meeting of the stockholders or directors was any act or action mentioned in said minutes rescinded or modified; that the signatures, "C. Henry Smith, President," "O. H. Root, Vice-President" and "G. R. Stack, Secretary," are the genuine signatures of C. Henry Smith, O. H. Root, your affiant, and G. R. Stack, respectively.

That on the 18th day of April, 1921, a meeting of the board of directors of the California & Oriental Steamship Company, a corporation, was held and at said meeting the following communication was received from C. Henry Smith, and that at said meeting the resignation contained in said communication [56] was duly accepted, to wit:

"SEATTLE. SAN FRANCISCO.

All offers subject to goods being unsold upon receipt of reply and to contingencies beyond our control
C. HENRY SMITH.
Cable "CHENRYINC" San Francisco.
Insurance Building,
Cor. California and Battery Streets,
San Francisco, U. S. A.

Codes:

Liebers A. B. C.

4th and 5th Edition United States Food Administration License No.

Western Union and Private, Bentley's & Scotts

Board of Directors,

California-Oriental S. S. Co.

San Francisco, California.

Dear Sirs:

I herewith tender you my resignation as a member of the Board of Directors of the California-Oriental S. S. Co., said resignation to take effect immediately.

C. HENRY SMITH."

That on the 19th day of April, 1921, at a meeting of the board of directors of the California & Oriental Steamship Company, a corporation, at which said meeting C. Henry Smith was present, the following resolution was offered and unanimously carried, to wit:

"With the unanimous consent of all the Directors of this Corporation, C. Henry Smith, Manager, was directed to send the following telegram to Arthur Mathiesen, corresponding owner, in Kristiania, Norway, to wit:

"Inasmuch as Steamer PACIFICO is owned by California and Oriental Steamship Company, please cable declaration that such is the fact that you are the representative of this Company. (Signed) SMITH";

that thereupon said telegram was sent in code by said

C. Henry Smith, a copy whereof and a translation thereof is as follows, [57] to wit:

"WESTERN UNION
CABLEGRAM.

SAN FRANCISCO APRIL 20th, 1921.

TIGRAM (ARTHUR MATHIESEN)
KRISTIANIA (NORWAY)
IFCICSCOWR PACIFICO IRFELNUYJP
CALIFORNIA ALAVKNOJHO SEFBEODVAD
BIYMEECOGM UKKIBTYTOE IRKAPFUVDA
UKMUGANILS PEASYMYRUT CYCLO
SMITH.

(Chg. C. HENRY SMITH)

1 Inasmuch as steamer
2 Pacifico
3 is owned by
4 CALIFORNIA
5 and Oriental
6 Steamship Company please
7 cable declaration
8 that such
9 is the fact
10 that you are the
11 representative of this
12 company";

that on the 21st day of April, 1921, the said C. Henry Smith exhibited to affiant a telegram which purported to be a reply to the telegram hereinabove set forth, and which said reply was in the words and figures following, to wit:

"COPY OF TELEGRAM.

San Francisco, Cal., April 21st, 1921.

From Tigram Arthur Mathiesen

Kristiania Norway

Translated By ER Checked by ER

Western Union Translation

Bentley's Code

Referring to your telegram just received Pacifico is actually owned by the California and Riental Steamship Company. I am registered owner of the steamer and representative of this company stop Accordance with your instructions bill of sale has been deposited with the Norsk-Hydro Kristiania as security for your debts to them. They are entitled to have clean bill of sale at any time transferred to them

TIGRAM." [58]

That at an adjourned meeting of the board of directors held on the 21st day of April, 1920, at the hour of 2 o'clock P. M., all the directors being present, the following resolution was offered and unanimously adopted:

"BE IT RESOLVED that C. Henry Smith, manager of this Corporation, shall have no power or authority to purchase or sell vessels or to sell or hypothecate any of the assets of this Corporation of whatsoever kind or character, or to enter into or execute oral or written contracts on behalf of this Corporation, or to execute or accept bills, notices, drafts or letters of credit without the consent of the Board of Directors of this Corporation, anything in the Minutes or By-Laws of this Corporation to the contrary notwithstanding.

O. H. ROOT. [59]

AFFIDAVIT IN SUPPORT OF PETITION FOR THE APPOINTMENT OF RECEIVER AND FOR INJUNCTION PENDENTE LITE.

State of California,
City and County of San Francisco,—ss.

Louis Ferrari, being first duly sworn, deposes and says: That he is a director of the California & Oriental Steamship Company, a corporation organized and existing under and by virtue of the laws of the State of California; that Richard Fitzpatrick is secretary of said corporation; that said Richard Fitzpatrick is absent from the city and county of San Francisco, and that affiant during the absence of said Richard Fitzpatrick is acting secretary of said corporation and that all the records of said corporation are in the possession of said affiant; that among the records of said corporation in the possession of said affiant are what purport to be copies of two letters sent by C. Henry Smith, one dated October 23d, 1920, to Chr. Barth, Esq., attorney at law, Christiania, Norway, and which said letter is in the words and figures following, to wit: [60]

"Oct. 23, 1920.

Chr. Barth, Esq.,
Attorney at Law,
Christiania, Norway.

Dear Mr. Barth:—

Referring to my letter of September 25th, I have had, in the meantime, occasion to transfer a steamer to Norwegian flag which was purchased

for friends here from Japanese owners, named the "Taigi Maru" or now named "Pacifico."

Inasmuch as all negotiations were carried on by cable I had to appoint a Corresponding owner in Norway in order to avoid any delay to the boat, and ship-owner, Mr. Arthur H. Mathiesen, Kristiania, has agreed to act as Correspondent for the steamer and I have so advised the Broker, Messrs. Pinkney & Co., Cardiff, and they are therefore, sending the necessary papers to Mr. Mathiesen.

If you will be willing to attend to the matter of incorporating the steamer in a Norwegian Company for the owners here, please send me a cable. I do not know whether your specialty is Admiralty Law, but if you, for any reason, could not handle this matter, probably you could recommend someone to us, by cable. In the meantime, I beg to mention the necessary particulars to follow in this case:

The owners here of the S.S. "PACIFICO" bought the steamer on a cash basis of £18–0–0 per deadweight ton, or £98,154,–0–0, and the capital stock of the company should be one-half of this amount or £49,077–0–0, or the equivalent amount in Norwegian currency.

I presume it will be necessary, according to Norwegian Law, to have at least three Norwegian Directors besides myself as I am an American Citizen, and if you in that case should be willing to stand as one of the Directors, I would name my brother, Privisor Arthur Smith, Sarpsborg, besides Mr. Arthur H. Mathiesen and I will write him in the matter in the same mail.

The name of the company should be A/S PACIFICO. As to your remineration, we shall, no doubt, be able to agree on this.

On account of having been obliged to make the necessary arrangements by cable with Mr. Mathiesen who will act as Corresponding Owner for the steamer, we have had no opportunity for drawing up any contract. As the steamer is owned by a company here, it would be necessary for me to have some sort of an agreement with Mr. Mathiesen, and I have offered him a remuneration of Kr. 12,000 per year during the time he is standing as Corresponding Owner and the duties will be principally to engage officers whenever any vacancies occur, to make up returns for taxes from statements that we will furnish him from here covering the earnings and expenses; [61] also to attend to the insurance at rates which are no higher than can be obtained from here. The stock is to be issued in the name of the California & Oriental Steamship Company, San Francisco, California, as this Company is the actual owner of the boat and the shares to be in denominations of Kr. 6,000 or Kr. 12,000.

If there are any other points that have not been fully explained, we can easily do so by cable. In the meantime, remain with kind regards,

Yours very truly,

C. HENRY SMITH.

By ————————.

CHS:G."

And another letter dated October 25th, 1920, to Mr. Arthur H. Mathiesen, Kristiania, Norway, and

which said letter is in the words and figures following, to wit:

"Oct. 25, 1920.

Mr. Aethur H. Mathiesen,
Kristiania, Norway.

Dear Sir:—

Referring to your cable today, as per copy enclosed, in which you suggested a limited company be formed according to Norwegian laws, I telegraphed in reply thereto that I had already sent full particulars by mail.

You will appreciate that on account of the limited time I had to take over this boat, I had not made any such arrangement and I am very much obliged to you for accepting the proposition I made, to act as Correspondent for the boat, and I have now written my friend, Advokat Barth, at Kristiania, with regard to this company. I asked Mr. Barth to get in touch with your good self and as I also thought it would be necessary to have a third Director under Norwegian law, I suggested my Brother, Arthur Smith, Sarpborg, who also will call on you in this connection.

I am thankful for the information in your cable that 6/10 of the capital must be owned by Norwegian subjects and I am writing Advokate Barth with regard to this stipulation.

INSURANCE: I beg to confirm cable in which I asked you to cover Kr. 2,000,000 Hull 6% and Interest and Disbursements Kr. 700,000 2¼%. The valuation of the steamer is Kr. 2,600,000, which kindly keep private.

I have cabled London for rates, but so far have not had any reply as they are very particular about which trade the steamer was to operate, so under the circumstances not having anything definite from London, I accepted your rates on the basis as just mentioned. [62]

I also appreciate very much that you have engaged three engineers 750, 575, and 480 respectively and three mates 560, 460 and 350, monthly, which is satisfactory and may say that I had already engaged a Captain through Messrs. Pinkney & Co. on the basis of Kr. 12,000 per year.

LOAN WITH MORTGAGE IN STEAMER: I have been in communication with a bank in Norway and also an attorney with regard to a loan and thought possibly you could arrange such a loan with the Skibs-Hyuothek Bank for one-half of the valuation, basis Kr. 2,600,000 and I shall be glad to hear on what terms such a loan can be obtained and particularly at what rate of interest.

Messrs. Pinkney & Co. will be sending you the papers after he has made transfer and may say that the transfer will be delayed a couple of days on account of the London bills for the balance of the payment being mailed by our Bank from New York instead of being telegraphed, but presume that these bills will arrive there not later than Thursday of this week.

Yours very truly,

C. HENRY SMITH.

By ————————.

CHS:G.
ENCS."

That affiant has been informed by C. Henry Smith, formerly president of said corporation, that said copies are true and correct copies of letters which he sent on the dates which said letters bear respectively to Chr. Barth and to Mr. Arthur Mathiesen.

LOUIS FERRARI. [63]

AFFIDAVIT IN SUPPORT OF APPOINTMENT OF RECEIVER AND INJUNCTION PENDENTE LITE.

State of California,
City and County of San Francisco,—ss.

G. W. Bell, being first duly sworn, deposes and says: That he is one of the attorneys for said plaintiff. That he has read the affidavits filed herein on August 8th, 1921, and the answer of defendants to the bill herein.

That on May 31st, 1921, plaintiff herein did file a libel to determine the right to possession of said vessel in the First Division of this court, in admiralty, a copy of which libel is attached to the affidavit of S. H. Derby. That on the filing of said libel against the steamship "Pacifico" and against C. Henry Smith and H. J. Hammer, the return day of process and the day for proclamation was fixed, according to the usual practice of said court in admiralty matters, for and as June 14th, 1921. That on that day plaintiff was ready to enter the default of all parties and persons, but was re-

quested by Mr. F. P. Griffiths, of the firm of McCutchen, Olney, Willard, Mannon & Greene, to allow said proclamation to be continued to June 23d, 1921, and to extend such amount of time for C. Henry Smith and H. J. Hammer to appear and plead. That said matter was again on June 23d, 1921, continued at the request of said F. P. Griffiths to June 27th, 1921, and on that day C. Henry Smith and H. J. Hammer appeared and filed claim to said vessel and answered said libel. That a copy of said answer is hereunto annexed as Exhibit "A." That at the same time said libelant was requested by said F. P. Griffiths not to enter the default of Norsk Hudro Electrisk Kvalstof Aktieselskab, a corporation, as a [64] representative of that corporation was on his way from Norway. That libelant on said day caused the default of all persons other than C. Henry Smith, H. J. Hammer and said Norsk Hydro to be entered, but acting solely on said request, refrained from entering default of said Norsk Hydro. That on July 7th, 1921, said F. P. Griffiths advised affiant that such Norwegian representative had arrived in San Francisco. That on July 9th, 1921, affiant was advised by said S. H. Derby that he had been retained to represent said Norsk Hydro and its representative who had just arrived in San Francisco, and that the firm of McCutchen, Olney, Willard, Mannon & Greene would also set for them except in so far as the interests of said defendants and C. Henry Smith, whom said firm represented, might be in conflict. That on July 11th, 1921, a conference was held with the possibility in view of

amicable settlement of said matter, at which conference were present said F. P. Griffiths, S. H. Derby, Bjarne Eriksen, the representative of said Norsk Hydro, Louis Ferrari, Richard Fitzpatrick and affiant, and another gentleman who appeared to be associated with said Bjarne Eriksen. That no settlement of said matter was reached at said meeting. That thereupon plaintiff's attorneys prepared the bill of complaint herein on file, and filed the same on July 16th, 1921. That process in said proceeding was served on the defendants herein by the United States marshal on July 18th, 1921.

That on July 11th, 1921, defendants herein filed their claim to said vessel, in said admiralty proceeding, and their answer to the libel therein, with certain interrogatories attached. That on July 16th, 1921, defendants herein filed a motion in said admiralty proceeding to release the attachment of said vessel therein and to try the jurisdiction of said Court, sitting in [65] admiralty, in the premises, and said motion was summarily set for hearing on July 19th, 1921. That on July 18th, 1921, plaintiff's attorneys filed exceptions to the interrogatories attached to said answer to said libel. That on July 19th, 1921, said motion in said admiralty proceeding came on for hearing, but as there was no judge of said court to hear it, the same was continued.

That as said bill in equity had been filed in this court and seemed to present the issues involved in said admiralty proceeding, and as some doubt existed as to the jurisdiction of said admiralty court to consider equitable titles in determining the right

to the possession of said vessel, it was mutually agreed between the attorneys for plaintiff herein and attorneys for defendants herein, to use the language of a letter from defendants' attorneys to plaintiff's attorneys, under date of July 22d, 1921, as follows:

"Gentlemen:

Re: California & Oriental Steamship Co.
vs. Steamship Pacifico.

In consideration of your dismissing your libel in the above cause, we hereby give you our assurance on behalf of ourselves and our clients that the steamer 'Pacifico' will not sail from this port for at least twenty (20) days from this date and also that our clients will during that time make no transfer or mortgage of said vessel.

Kindly execute the enclosed dismissal of the libel in pursuance of our understanding as above expressed.

Very truly yours."

That said time of 20 days was fixed upon as the minimum time within which said vessel would be physically able to depart from this port.

That thereupon, on July 23d, 1921, the dismissal referred to in said letter was signed by the attorneys for plaintiff and the attorneys for defendants, and filed and said libel was [66] dismissed, and said vessel released from the custody of the United States Marshal.

That on Saturday, August 6th, 1921, the answer of defendants to the bill of complaint herein was served upon plaintiff's attorneys and filed.

That on Saturday, August 6th, plaintiff filed herein its petition for the appointment of a receiver and for an injunction *pendente lite,* and obtained an order to defendants to appeal on Monday, August 8th, 1921, and show cause why the relief therein prayed for should not be granted.

That said agreed twenty (20) days will not expire until August 12th. That plaintiff and its attorneys have at all times been diligent in said matter, and have voluntarily extended time to defendants at their request in said admiralty libel, as aforesaid, and have not delayed or endeavored to delay this proceeding in any way or manner whatsoever. That the only reason that plaintiff requested this Court for a continuance from August 8th, 1921, to August 9th, 1921, was for the purpose of procuring affidavits to meet the affidavits served by defendants on August 8th, 1921, and the answer served by defendants on Saturday afternoon, August 6th, 1921, and in particular the affidavit of C. Henry Smith.

That upon the arrival of said steamer in San Francisco in the month of May, 1921, the freight moneys earned by said vessel on her voyage to San Francisco were collected and the disbursements for said vessel, including the payment of the master and crew and all other usual expenses, by and through Mr. Richard Fitzpatrick, Secretary of plaintiff corporation, as said master was informed and well knew. That said vessel has always been in the possession of plaintiff corporation, as affiant is informed and verily believes. [67]

That although affiant has made diligent search and inquiry, he has been able to find no law of the Kingdom of Norway prohibiting or penalizing in any way a transfer of a vessel under Norwegian registry under decree of a court of the United States of America directed to the person in whose name such register stands, after such person has been served with the process of such court within its territorial jurisdiction, in which such vessel is also located, and affiant believes and alleges that no such law exists in the Kingdom of Norway. And affiant further alleges, in information and belief, that upon the decree of this court ordering defendants or a commissioner appointed by this court for the purpose, to transfer said vessel to plaintiff or to some person by plaintiff designated, the Government of Norway would merely authorize and instruct the Norwegian Consul at this port to remove the Norwegian lettering and numbering and the Norwegian flag from said vessel and cancel her Norwegian registry, whereupon she could be registered under the laws of such jurisdiction as plaintiff might desire to register her under.

(Signed) G. W. BELL. [68]

Exhibit "A."

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,231.

THE CALIFORNIA & ORIENTAL STEAMSHIP CO., a Corporation,

Libelant,

vs.

Norwegian Steamship "PACIFICO," Her Engines, Boilers, Tackle and Furniture, H. J. HAMMER and C. HENRY SMITH.

Respondents.

H. J. HAMMER and C. HENRY SMITH,

Claimants.

Answer of Respondents and Claimants H. J. Hammer and C. Henry Smith.

To the Honorable M. T. DOOLING, Judge of the Above-entitled Court:

Come now H. J. Hammer and C. Henry Smith, respondents and claimants herein, and answer the libel as follows:

I.

Deny that possession of the said steamship is or at any time has been wrongfully withheld from the said libelant by the said H. J. Hammer and C. Henry Smith, or by the said H. J. Hammer or by C. Henry Smith on an alleged ground of title to the possession of said vessel, or that possession of

said steamship is or ever has been wrongfully withheld by them or either of them [69] in any way or at all. Deny that the claim of title to the possession of said vessel of the said H. J. Hammer and the said C. Henry Smith or of either of them is entirely or at all false and invalid or false or invalid.

II.

Deny that all and singular or all or singular the premises are true.

WHEREFORE, said respondents and claimants pray that said libel be dismissed and that they do have their costs herein incurred and such other relief as may be proper in the premises.

FARNHAM P. GRIFFITHS.
McCUTCHEN, WILLARD, MANNON & GREENE,
Proctors for Claimants and Respondents.

State of California,
City and County of San Francisco,—ss.

H. J. Hammer, being first duly sworn, deposes and says that he is one of the respondents named in the libel herein and in the foregoing answer thereto; that he has read said answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon his information or belief and that as to those matters he believes it to be true.

H. J. HAMMER.

Subscribed and sworn to before me this 25th day of July, 1921.

[Seal] JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California. [70]

That thereupon the defendants offered and there was received in evidence a publication purporting to be published at Christiania, Norway, and entitled, "Collection of Norwegian Laws Published for the Use of the Legations and Consulates, 1916–1920." (It is hereby stipulated that said publication may be transmitted to the Appellate Court as an original exhibit.)

That thereupon it was stipulated that the A. Mathiesen mentioned in the pleadings and affidavits had, on or about the 24th day of June, 1921, written a letter to the Bank of Italy, and that said letter had been received by said bank in due course of mail, and in evidence of the contents of said letter the defendants offered in evidence, without objection on the part of the plaintiff, a copy thereof, admitted by plaintiff to be a true copy, and admitted by the defendants to be a copy delivered by said A. Mathiesen to the defendant Norsk Hydro Elektrisk Kvaelstof Aktieselskab, and said copy reads:

Kristiania, 24th June, 1921.

Bank of Italy,

San Francisco.

Dear Sirs:

I have today received the copies from you of your telegrams of the 2nd and 3rd inst. and beg for the

sake of order to send you herewith copies of my telegrams of the 7th and 10th inst.

As you may have been able to understand it was exclusively at the request of Mr. Smith in his telegram of the 20th April reading: "Inasmuch steamer Pacifico is owned California and Oriental Steamship Co. please cable declaration that such is [71] the fact that you are the representative of this company"; that on the following day I acknowledged his notification. I found it, however, at the same time expedient to make a mention of the fact that, according to his instructions, the Bill of Sale which in due course had been received by me had on the 21st January, 1921, been deposited in original with The Norsk Hydro Elektrisk Kvaelstofaktieselskap (endorsed in blank).

Under contract of the 11th October 1920 S/S "Pacifico" was sold by Uchida Kisen Kabushiki Kaisha, of Kobe, to Mr. Smith, who requested me to be so kind as to have the vessel transferred to the Norwegian Flag with me as chartered owner. All instructions in connection with this vessel have been given me by Mr. Smith, and also all correspondence been signed by him personally, and as it moreover was he who appointed me it is a matter of course that I had neither right, occasion nor reason to fail to conform with his instructions. On the contrary I was bound to do so. How far Mr. Smith has gone beyond his power is unknown to me, and has nothing to do with me.

On the 13th inst. I received from Norsk Hydro information to the effect that the vessel had under

the Bill of Sale deposited with them on the 21st January been registered as belonging to their advocate, Mr. Bjarne Eriksen, here. I have therefore no longer anything to do with this ship.

Yours faithfully,

(S.) ARTH. H. MATHIESEN.

P. S.—I duly advised Norsk Hydro of the contents of your telegrams.

Bilag
100
E San Fredrikshold [72]

Testimony of J. H. Hammer, for Defendants.

That thereafter J. H. HAMMER was called as a witness on behalf of the defendants and testified as follows:

Mr. OLNEY.—Q. Captain Hammer, are you the captain of the steamship "Pacifico"? A. Yes, sir.

Q. How long have you been captain?

A. Since the 3d of November, last year.

Q. You were in command of her when she arrived in this port last May? A. Yes, sir.

Q. At what time did she arrive?

A. The 24th of May.

Q. How was the crew paid off?

A. They got their money, all that was coming to them up to the 25th of May.

Q. Who paid them?

A. The first time it was paid by Mr. Ferrari and Mr. Blake, I think; they came on board with the money on the 25th of May.

Q. Mr. Ferrari, of the Bank of Italy?

(Testimony of J. H. Hammer.)

A. Yes, sir.

Mr. OLNEY.—Mr. Ferrari, it will be admitted that you are a director of the Bank of Italy?

Mr. FERRARI.—Yes, and also a director of the California & Oriental Steamship Company.

Mr. OLNEY.—Q. Mr. Blake is in C. Henry Smith's office? A. Yes, sir.

Q. Was anything said to you at that time about the California & Oriental Steamship Company?

A. No, I don't think so.

Q. Who collected the freight money, so far as you know?

A. I don't know who collected it. So far as I know, the Bank of Italy collected the freight money. That is what I heard.

Q. You don't know anything about that of your own knowledge, do you? A. No. [73]

Q. When did you first learn that the California & Oriental Steamship Company claimed any interest in this boat?

A. I think that was on the boat, on the 31st of May, when they put the Marshal on board.

Cross-examination.

Mr. BELL.—Q. Captain Hammer, prior to that time who did you think was the owner of the vessel? A. Mr. Smith.

Q. Mr. C. Henry Smith? A. Yes, sir.

Q. You didn't know anything about the Norsk Hydro being the owner, did you?

A. No, not at that time.

(Testimony of J. H. Hammer.)

At the request of counsel for the plaintiff, counsel for the defendants also made a stipulation in open court in the following words:

"In the office of C. Henry Smith were kept the accounts of himself and the California & Oriental Steamship Company, and another company, I believe; that in these accounts, and apparently as a personal account of his, appeared, up to February of this year, an account or a sheet entitled "Pacifico," showing the disbursements by Mr. Smith on account of that vessel, and showing a payment by him of the purchase price, and showing also the receipt by him of the approximately $60,000 that was paid in on account of the purchase price. In February, 1921, that account was changed by writing the name California & Oriental Steamship Company above it. That was done by Mr. Blake after a talk with Mr. C. Henry Smith. Mr. Blake is the bookkeeper."

That thereupon the matter was argued and submitted for decision, and thereafter, and on the 12th day of August, 1921, said [74] court in open court orally rendered its decision granting plaintiff's petition for a receiver, and on August 15, 1921, made its written order appointing Captain John Leale receiver of the steamship "Pacifico," her engines, etc.

Dated: August 18, 1921.

McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,

McCLANAHAN & DERBY,

Attorneys for Defendants.

BELL, BROOKMAN, SIMMONS, & CREECH,

LOUIS FERRARI,

Attorneys for Plaintiff.

The foregoing agreed statement of the case is approved, and IT IS HEREBY ORDERED that the publication therein mentioned be transmitted to the Appellate Court as an original exhibit, as stipulated.

Dated: Aug. 23d, 1921.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Aug. 23, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [75]

In the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAMSHIP CO., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB, a Corporation, and BJARNE ERIKSEN, an Individual,

Defendants.

Petition for Allowance of Appeal.

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB, a corporation, and BJARNE ERIKSEN, defendants in the above-entitled action, feeling aggrieved by the decision of the court in said action and the order entered herein on the 15th day of August, 1921, wherein and whereby Captain John Leale was appointed receiver of the Steamship "Pacifico," her engines, boilers, tackle, apparel, and furniture, etc., comes now by its undersigned attorneys and petitions said court for an order allowing said defendants to prosecute an appeal to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the amount of the cost bond, which said defendants shall give and furnish upon said appeal.

And your petitioners will ever pray.

McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
McCLANAHAN & DERBY,
Attorneys for Defendants. [76]

Service of the within Petition and receipt of a copy is hereby admitted this 23d day of August, 1921.

LOUIS FERRARI,
BELL, BROOKMAN, SIMMONS & CREECH,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 23, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [77]

In the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAMSHIP CO., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB, a Corporation, and BJARNE ERIKSEN, an Individual,

Defendants.

Assignment of Errors.

Come now the defendants above named and make and file the following assignment of errors upon which they will rely in the prosecution of their appeal in the above-entitled cause.

I.

That the Court erred in making and entering its order on August 15th, 1921, appointing a receiver for the steamer "Pacifico" and enjoining defendants from interference with said receiver and the property in his charge.

II.

That the Court erred in appointing a receiver for the steamer "Pacifico" for the reason that, on the showing made by plaintiff and defendants, such ap-

pointment was unjustified and an abuse of the Court's discretion.

III.

That the Court erred in appointing a receiver in [78] view of the showing made by defendants that the transfer of the steamer "Pacifico" to them was made in good faith and for value and without notice on their part of any interest held by plaintiff in said steamer or any notice or knowledge of any facts or circumstances which would have put a reasonable man upon inquiry and in that plaintiff's denials on this point were based solely on information and belief.

IV.

That the Court erred in appointing a receiver in view of the uncontradicted showing made by defendants in the third separate defense set up in their answer, which showing was also supplemented by specific affidavits.

V.

That the Court erred in appointing a receiver in that under the law of Norway as set up in the fourth separate defense of defendants' answer and proved at the hearing the plaintiff could not be legally or beneficially interested in the steamer "Pacifico" and the defendants could not transfer either the registered or beneficial ownership to plaintiff without being guilty of a violation of said laws of Norway and subjecting themselves to fine and imprisonment and said steamer to forfeiture, and in that plaintiffs denials of the existence of such laws were based on information and belief.

VI.

That the Court erred in appointing a receiver in that plaintiff was guilty of laches in applying for such appointment.

VII.

That the Court erred in appointing a receiver [79] in that the grounds for requesting such appointment, as shown by the whole record, were wholly without equity.

Wherefore, said defendants pray that the said order of the above-entitled court appointing Captain John Leale receiver herein be reversed.

McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
McCLANAHAN & DERBY,
Attorneys for said Defendants.

Dated San Francisco, Cal., August 23d, 1921.

Service of the within assignment of errors and receipt of a copy is hereby admitted this 23d day of August, 1921.

LOUIS FERRARI,
BELL, BROOKMAN, SIMMONS & CREECH,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 23, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [80]

In the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAMSHIP Co., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB, a Corporation, and BJARNE ERIKSEN, an Individual,

Defendants.

Order Allowing Appeal and Fixing Amount of Cost Bond.

Upon motion of the attorneys for defendants in the above-entitled action, and upon filing a petition for the allowance of an appeal and an assignment of errors,—

IT IS ORDERED that the said appeal be, and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the order heretofore made and entered herein on the 15th day of August, 1921, appointing Captain John Leale, receiver of the steamship "Pacifico," her engines, boilers, tackle, apparel and furniture, etc.

IT IS FURTHER ORDERED that said defendants shall file its undertaking and cost bond in the sum of $500 dollars.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Aug. 23, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [81]

In the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAMSHIP CO., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB, a Corporation, and BJARNE ERIKSEN, an Individual,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, American Surety Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, duly authorized to transact a surety business in the State of California, and fully qualified before the Department of Justice to execute bonds and undertakings in any and all Federal Courts in the United States of America, is held and firmly bound unto The California & Oriental Steamship Co., a corporation, plaintiff in the above-entitled action, in the full and just sum of two hundred and fifty (250) dollars, lawful money of

the United States, to be paid to said plaintiff, The California & Oriental Steamship Co., a corporation, to which payment well and truly to be made we bind ourselves, our successors, representatives and assigns, firmly by these presents. [82]

Sealed with our seals and dated this 23d day of August, 1921.

WHEREAS, the above-named defendants, Norsk Hydro Elektrisk Kvaelstof Aktieselskab, a corporation, and Bjarne Eriksen, have obtained from the District Court of the United States, for the Northern District of California, Southern Division, its order allowing said defendants to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, to reverse the order made and entered in the above-entitled action on the 15th day of August, 1921, wherein and whereby Captain John Leale was appointed receiver of the steamship "Pacifico," her engines, boilers, tackle, apparel and furniture, etc.,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendants, Norsk Hydro Elektrisk Kvaelstof Aktieselskab, a corporation, and Bjarne Eriksen, shall prosecute such appeal to effect and answer all costs if they shall fail to make good such plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, American Surety Company of New York, a corporation, has hereunto caused its corporate name to be signed and attested, and its corporate seal to be affixed by its duly au-

thorized officers, at San Francisco, California, this 23d day of August, 1921.

AMERICAN SURETY COMPANY OF NEW YORK,

By R. D. WELDON,
Resident Vice-president.

[Seal] Attest: E. C. MILLER,
Resident, Assistant Secretary. [83]

The foregoing bond is hereby approved as to form this 23d day of August, 1921.

LOUIS FERRARI,
BELL, BROOKMAN, SIMMONS & CREECH,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco.

On this 22d day of August, in the year one thousand nine hundred and twenty-one, before me, John McCallan, a notary public in and for said city and county, state aforesaid, residing therein, duly commissioned and sworn, personally appeared R. D. Weldon and E. C. Miller, known to me to be the resident vice-president and resident assistant secretary respectively of the American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that said corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said

city and county of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires 4/12/25. [84]

Approved.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Aug. 23, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [85]

In the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAMSHIP Co., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB, a Corporation, and BJARNE ERIKSEN, an Individual,

Defendants.

Praecipe for Transcript of Record.

The clerk of the above-entitled court will please prepare a transcript of the record for the Circuit Court of Appeals in the above-entitled matter, and is hereby directed to insert therein the following:

(1) The agreed statement of case for use on appeal, made and entered into on the 18th day of August, 1921, and on file herein.

(2) The order of the above-entitled court appointing receiver, made and entered herein on the 15th day of August, 1921.

(3) Petition for allowance of appeal;
Order allowing appeal;
Assignment of errors;
Bond on appeal; Citation.

Dated San Francisco, California, this 23d day of August, 1921.

McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
McCLANAHAN & DERBY,
Attorneys for Defendants. [86]

Service of the within praecipe and receipt of a copy is hereby admitted this 23d day of August, 1921.

LOUIS FERRARI,
BELL, BROOKMAN, SIMMONS & CREECH,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug, 4, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [87]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAMSHIP Co., a Corporation,

Plaintiff.

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB, a Corporation, and BJARNE ERIKSEN, an Individual,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing eighty-seven (87) pages, numbered from 1 to 87, inclusive, to be full, true and correct copies of the record and proceedings in the above-entitled cause, as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the office of the clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further cedtify that the cost of the foregoing transcript of record is $36.90; that said amount was paid by the defendants; and that the original Citation issued in said cause is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of August, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [88]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to The California & Oriental Steamship Co., a Corporation, and to Messrs. Bell, Brookman, Simmons & Creech and Louis Ferrari, Attorneys for Said Plaintiff, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein the defendants herein, Norsk Hydro Elektrisk Kvaelstof Aktieselskab, a corporation, and Bjarne Eriksen, are appellants, and you are appellee, to show cause, if any there be, why the order rendered, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 23d day of August, A. D. 1921.

WM. C. VAN FLEET,
United States District Judge.

Service of the within citation and receipt of a copy is hereby admitted this 24th day of August, 1921.

LOUIS FERRARI,
BELL, BROOKMAN, SIMMONS & CREECH,
Attorneys for Plaintiff, The California & Oriental Steamship Company, a Corporation.

[Endorsed]: No. 632. In the Southern Division of the United States District Court for the Northern District of California, Second Division. In Equity. The California & Oriental Steamship Company, a Corporation, Plaintiff, vs. Norsk Hydro Elektrisk Kaelstof Antieselskab, a Corporation, and Bjarne Eriksen, an Individual, Defendants. Citation on Appeal. Filed Aug. 24, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [89]

[Endorsed]: No. 3758. United States Circuit Court of Appeals for the Ninth Circuit. Norsk Hydro Elektrisk Kvaelstof Aktieselskab, a Corporation, and Bjarne Eriksen, Appellants, vs. The California & Oriental Steamship Company, a Corporation, Appellee. Transcript of Record. Upon

Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 26, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.